In the Supreme Court of the United States.

OCTOBER TERM, 1903.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.
NO. 12. ORIGINAL.

PETITION FOR WRITS OF PROHIBITION AND CERTIORARI TO THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The question sought to be raised upon this petition is the constitutionality of the legislation by Congress (act of July 1, 1902, c. 1362, 32 Stat., 641, 646–9) establishing the Choctaw and Chickasaw Citizenship Court and authorizing it to review the judgments of the United States courts in the Indian Territory in certain Choctaw and Chickasaw citizenship cases appealed thereto from the Dawes Commission, as the Commission to the Five Civilized Tribes of Indians is commonly called.

By the act of June 10, 1896, c. 398 (29 Stat., 321, 339), Congress, in pursuance of its plan to extinguish

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the tribal title to lands in the Indian Territory by allotting the same in severalty among the members of the several tribes or nations therein, with a view to the ultimate erection of a State or States, authorized the Dawes Commission to proceed at once to hear and determine the application of all persons to be admitted and enrolled as citizens in any of said nations, in doing which they were required to respect "all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes."

The rolls of citizenship of the several tribes, as then existing, were confirmed by that act, and any person whose application to be enrolled had been denied or not acted upon by the Commission within the time prescribed, or who might desire such citizenship, was authorized to apply to the legally constituted court or committee designated by the several tribes.

In the performance of their duties the Commission were authorized to administer oaths, issue process for and compel the attendance of witnesses, send for persons, papers, etc., "and to use every fair and reasonable means within their reach *for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud and wrong.*"

It was also provided by the act of June 10, 1896, that the tribe or any person aggrieved with the decision of the tribal authorities or the Commission might

appeal to the United States *district* court, whose judgment should be final.

After the expiration of six months, the Commission were required to "cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations, or tribes, *subject, however, to the determination of the United States courts as provided herein.*"

The Commission were also required "to file the lists of members as they finally approved them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities."

In exercising the appellate jurisdiction conferred upon them by the act of June 10, 1896, the United States courts in the Indian Territory did not limit their inquiry to a review of the citizenship cases appealed thereto from the Dawes Commission upon the papers and evidence submitted to that Commission, but examined such cases *de novo*, upon evidence taken before commissioners appointed for that purpose. As a result, it is claimed, opportunity was given for the commission of fraud and perjury by numerous persons, commonly designated "court claimants," wrongfully seeking admission into said tribes, and whose applications had been denied by the Commission.

The Choctaw and Chickasaw nations filed a protest with the Dawes Commission against the enrollment of

any such persons as members of their respective tribes, on the ground not only of illegality and fraud in the procurement of such judgments, but because of the failure to give notice of such proceedings to both of said nations, and for other irregularities.

By a provision in the Indian appropriation act of July 1, 1898, c. 545 (30 Stat., 591), inspired, it is to be inferred from later events, by dissatisfaction with the proceedings of the United States courts in the Indian Territory in matters relating to enrollment and the allotment of lands, appeals to this court were allowed to either party from those courts "in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases."

In *Stephens* v. *Cherokee Nation* (174 U. S., 445), however, it was held that the appeal given by this act was restricted to a determination of the constitutionality and validity of the legislation by Congress affecting citizenship or the allotment of lands in the Indian Territory (which was upheld) and did not extend to a review of either class of cases upon their merits.

In pursuance of the attempt to prevent the "court claimants" from being enrolled, certain individual members of the Choctaw and Chickasaw nations, endeavoring to sue for all other members of said tribes as well as themselves, filed a bill in equity in the

United States court for the southern district of the Indian Territory against one Goodall and others, for the purpose of having the judgments referred to vacated and annulled and the defendants enjoined from exercising any rights thereunder. As stated by petitioner, this case is now pending in the court of appeals for the Indian Territory, on the appeal of complainants. A similar bill was also filed in the central district of the Indian Territory against one Arnold and others. It is not perceived, however, that these suits have any bearing upon the present case, except as illustrating and emphasizing the belief of the Choctaw and Chickasaw nations, and the members thereof, that great wrong and injustice had been done them through the action of the United States courts by admitting the persons referred to to citizenship.

This and other matters being called to the attention of the Secretary of the Interior, that officer directed the Dawes Commission to negotiate a supplemental treaty or agreement with the Choctaw and Chickasaw nations. Such an agreement was made between the representatives of the United States and the two nations on the 7th of February, 1901. In transmitting it to Congress the Secretary said that experience had demonstrated that the previous agreement (known as the Atoka agreement), ratified by the act of June 28, 1898, was faulty and did not work with satisfaction to the Indians or the public, and that there was pressing reason for supplementing it by a new and further agreement; and, referring to the citizenship judgments

rendered by the United States courts in the Indian Territory, he observed:

> *Believing that the questions affecting the validity and rectitude of these judgments deserved judicial investigation and scrutiny*, article 8 has been rewritten, as shown in the amended draft of the agreement, so as to provide for a fair, speedy, and final decision of these questions by judicial tribunals.

The agreement of February 7, 1901, was not transmitted in time to be acted upon by Congress at that session; and subsequently the Secretary of the Interior directed the Dawes Commission to negotiate another agreement along the same lines for transmittal to the Fifty-seventh Congress at its first session. This latter agreement, which provided for the creation of the Choctaw and Chickasaw Citizenship Court, and authorized the review of the citizenship judgments in question, was concluded between the representatives of the United States and the Choctaw and Chickasaw nations March 21, 1902, and ratified and confirmed by the act of Congress of July 1, 1902 (32 Stat., 641). The material provisions thereof are as follows:

> SEC. 27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the acts of Congress approved June 28, 1898 (30 Stat., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided:
>
> *Provided*, That no person claiming right to

enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896, instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

* * * * *

SEC. 31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceeding in such courts being given to each of said nations; and it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court

hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained, as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of

either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and, upon the filing in such citizenship court of the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

SEC. 32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly, or by either of them acting separately, at any time within six months after this agreement is finally ratified. In the exercise of such appellate

jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted, and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two, and thirty-three hereof shall go into effect immediately after the passage of this act of Congress.

SEC. 33. A court is hereby created to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to

the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process, and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers, and documents, the attendance of witnesses, and in punishing contempt. Except where herein otherwise expressly provided, the pleadings, practice, and proceedings in said court shall conform, as near as may be, to the pleadings, practice, and proceedings in equity causes in the circuit court of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. * * * The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certificates. *The judgment of the citizenship court in any or all of the suits or*

proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

It will be observed that the proviso to section 32 provides "that paragraphs 31, 32, and 33 shall go into effect immediately after the passage of this act by Congress." But the entire act, so far as it related to the Choctaw and Chickasaw nations, was ratified by a majority of the legal voters of those two nations, at an election held in accordance with the provisions of secions 73 and 74 thereof, on September 25, 1902.

The Choctaw and Chickasaw Citizenship Court having been organized as provided by paragraph 33 of the act, the Choctaw and Chickasaw nations, in virtue of the authority given by paragraph 31, filed therein a bill in equity against J. T. Riddle and nine other persons, as representing all others similarly situated, for the purpose of having the citizenship judgments rendered by the United States courts in the Indian Territory set aside and annulled for the reasons specified in the latter paragraph.

The defendants—and others similarly situated who, upon their application, were made parties to the suit—

filed answers, all of which (as appears from the opinion of the court) admitted that notice was served upon but one of said nations, and that the citizenship cases appealed from the Dawes Commission were tried *de novo* by the United States courts, but asserted, notwithstanding, the validity of all such proceedings.

On December 17, 1902, the Citizenship Court entered its final decree in this test case, in which, after reciting that "due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity to law," and that "said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants who desired to be heard were heard," it was held that notice to each of the Choctaw and Chickasaw nations of the proceedings in the United States courts in the Indian Territory, acting under the act of June 10, 1896, admitting persons to citizenship, or to enrollment as citizens, in those nations respectively, was indispensable; and that those courts should not have reviewed such cases *de novo*, but should have confined their proceedings to a review of the action of the Dawes Commission upon the papers and evidence submitted to that Commission. It was accordingly ordered, adjudged, and decreed that all of said judgments "in favor of the ten defendants named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid in favor of all persons similarly situated," be set aside, annulled, and vacated.

Among those "similarly situated" was the petitioner, U. S. Joins, who had been adjudged to be a member of the Chickasaw tribe of Indians by the United States court for the southern district of the Indian Territory, March 8, 1898, upon an appeal taken from the decision of the Dawes Commission denying his application.

ARGUMENT.

I.

No case justifying the issuance of a writ of prohibition is presented.

The specific purposes for which a prohibition is sought are to prevent the Choctaw and Chickasaw Citizenship Court from "giving further effect" to its decree in the test case, and to restrain it from certifying a copy of that decree to the Dawes Commission.

1. As to the latter object, it is sufficient to say that it appears from the return filed by the Citizenship Court (par. 1) that, although not required to do so by the statute, a copy of its decree in the test case was certified and delivered by it to the Dawes Commission prior to the filing of the petition herein.

2. The decree in the test case has already had its full effect by operation of law, and is now entirely beyond the control of the Citizenship Court. The test suit, which the statute declared should be "confined to a final determination of the questions of law here named," was fully and finally completed when the court rendered a decree in accordance with its conclusions upon those questions. By that

decree the judgments of the United States courts in the Indian Territory, which the Citizenship Court had under review, were annulled, vacated, and set aside. No further action in that suit was required of the Citizenship Court, the decree being self-executing.

The proceedings provided for by the act (sec. 31), "in the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized," are not only separate and distinct from the test suit, but wholly dependent upon the voluntary action of each and every individual whose judgment was so annulled and vacated.

The statute merely affords an opportunity for those whose judgments were set aside by the decree in the test suit to have their cases reviewed by the Citizenship Court. It was discretionary with each individual concerned whether this opportunity should be availed of. If not, the decree in the test case remains a final and complete adjudication of his rights. If he transferred his case, such proceeding on *his* part certainly could not be said to be an effort *by the court* to give further effect to its decree in the test case. Besides, the proceedings on such transfer might result in his admission to citizenship, thus practically reversing the decree in the test suit so far as his particular case was concerned.

At the time of filing his petition herein the petitioner, Joins, had not made application for the transfer of the papers in his case from the United States court having control of the same to the Citizenship Court.

Since then, however, according to the return of that court (par. 2), he has made such application, and his cause is now pending therein. He has thus placed himself in the attitute of invoking the jurisdiction of the Citizenship Court at the very moment he is seeking to restrain it from taking further proceedings for the enforcement of its decree in the test case. Or, stated a little differently, he has himself instituted the very proceeding which his petition prays to be restrained.

It is manifest that the real object of petitioner is not to prevent the doing of some act which is about to be done by the Citizenship Court, but to have this court review and undo that which has been fully and finally completed, namely, the decision of the Citizenship Court in the test case. But this court has held that the writ of prohibition can not be used for such a purpose. (*United States* v. *Hoffman*, 4 Wall., 158.)

The test suit is a completed fact, and "prohibition will not lie after the cause is ended." (*Hall* v. *Norwood*, Siderfin, 166, cited in *United States* v. *Hoffman*, *supra*.)

The writ of prohibition can not be made to serve the office of a writ of error.

> It is no ground for relief by prohibition that provision has not been made for a review of the decision of the court of original jurisdiction, by appeal or otherwise. A prohibition can not be made to perform the office of a proceeding for the correction of mere errors or irregularities. (*Ex parte Ferry Co.*, 104 U. S., 519, 520.)

It will be observed that section 31 of the act in question contains a proviso that the test suit therein authorized "shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment was wrongfully obtained, as provided in the next section;" and that by the "next section" (sec. 32) Congress provided for the contingency of the Citizenship Court deciding the test suit adversely to the Choctaw and Chickasaw nations, by giving those nations, acting jointly or separately, a right to appeal the judgments in question to the Citizenship Court, which, in the exercise of the jurisdiction thus conferred, was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine *the very right of the controversy.*"

Section 32 further provides that "such Citizenship Court shall have like appellate jurisdiction and authority over judgments rendered by such courts under the said act *denying* claims to citizenship or to enrollment in either of said nations; notice of such appeals by citizenship claimants to be served upon the chief executive officer of both nations."

It thus appears that by the act in question Congress endeavored to accord an equal measure of right to all parties concerned, its only purpose being to have "the

very right of the controversy" determined. It is also clear that the decision in the test suit, whether in favor of one party or the other, was to be equally binding upon both and final and conclusive in respect to the subject-matter thereof; and that any further proceedings under the act would be separate and distinct from that suit, the initiative in either case resting upon the defeated party.

It should, perhaps, be noted that by the amendatory act of March 3, 1903 (32 Stat., 995), it was provided that all causes transferred to the Citizenship Court under section 31 of the act of July 1, 1902, should be tried, determined, and disposed of the same as if appealed to such court under section 32 of said act. The amendatory act also provided that this court might transfer to the Citizenship Court the Choctaw and Chickasaw citizenship cases appealed here from the United States courts in the Indian Territory during the year 1898.

II.

A prohibition would obstruct the action of the political department of the Government.

The Choctaw and Chickasaw Citizenship Court, like the Dawes Commission, is a political agency created by Congress in furtherance of the plan outlined in the act of March 3, 1893 (27 Stats., 645), namely, the extinguishment of the national or tribal title to lands within the Indian Territory "with a view to such adjustment, upon the basis of justice and equity, as may, with the consent of such nations or

tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." (*Stephens* v. *Cherokee Nation*, 174 U. S., 446.)

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 308) this court said:

> The power existing in Congress to administer upon and guard the tribal property, and the power being *political* and *administrative* in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, *and is not one for the courts.*

The political nature of the measures adopted by Congress for the control and betterment of the Indian tribes within the United States, and its exclusive authority in respect thereto, was again affirmed in *Lone Wolf* v. *Hitchcock* (187 U. S., 558, 567), in which it was said:

> *Plenary* authority over the tribal relations has been exercised by Congress from the beginning, and the power has always been deemed a *political* one, *not subject to be controlled by the judicial department of the Government.*

In re Cooper (138 U. S., 404) this court entertained an application for a writ of prohibition to the district court of Alaska in an admiralty proceeding, holding that in such case it came within section 688, Revised Statutes; but upon final hearing (143 U. S., 472) declined to issue the writ, upon the ground that the record showed jurisdiction in the Alaskan court. The

court stated, however, that it might have rested its denial "upon the well-settled principle that an application to a court to review the action of the political department of the Government * * * should be denied."

III.

Having no appellate jurisdiction over the Choctaw and Chickasaw Citizenship Court, this court can not issue a writ of prohibition thereto.

In *Ex parte Gordon* (1 Black, 503, 506) the court said:

> A prohibition can not issue from this court in cases *where there is no appellate power given by law*, nor any special authority to issue the writ.

See also Foster's Fed. Prac., vol. 2, sec. 362.

The "special authority" of this court to issue a writ of prohibition is limited to the district courts of the United States when sitting as courts of admiralty. (Rev. Stat., sec. 688.)

Ex parte Christy, 3 How., 293.
Ex parte Gordon, 1 Black, 503.
Ex parte Easton, 95 U. S., 68.
Ex parte Phoenix Ins. Co., 118 U. S., 610.

No appellate power has been conferred "by law" upon this court over the Citizenship Court. On the contrary, the act creating it declares that all its judgments and decrees shall be final (sec. 33).

The Citizenship Court is not a "constitutional" court, in which the judicial power of the United States referred to in article 3 of the Constitution may be

vested, but a "legislative" court, created by Congress in virtue of the general sovereignty of the United States over all territory within its limits, whether occupied by Indian tribes or not.

> *American Ins. Co.* v. *Canter*, 1 Pet., 321.
> *United States* v. *Kagama*, 118 U. S., 380.

It is a special tribunal, created for a particular purpose, and will expire by limitation, in any event, on December 31, 1904. (Amend. act, March 3, 1903, 32 S at., 995.)

Not being a "constitutional" court, and, unlike the regular Territorial courts, possessing no general law and equity jurisdiction, the question whether this court can issue a writ of prohibition thereto in the exercise of its "inherent general power" can not arise. (*In re Vidal*, 179 U. S., 126.)

In re Vidal was an application for leave to file a petition for certiorari to review the proceedings of a military tribunal established by a general of the United States Army while in supreme command in Porto Rico. In denying the application, this court, referring to section 14 of the judiciary act of 1789 (sec. 716, R. S.), which authorizes the Supreme and other Federal courts "to issue all writs, not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the usages and principles of law," said:

> This court is not thereby empowered to review the proceedings of military tribunals by certiorari; nor are such tribunals courts with

jurisdiction in law or equity within the meaning of those terms as used in the third article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power can not arise in respect of them.

IV.

The legislation in question is constitutional.

The history of this legislation shows that it was passed by Congress, at the solicitation and with the consent of the Indians concerned, for the purpose of protecting them against fraud and wrong. Its power to that end is unquestionable (*United States* v. *Kagama*, 118 U. S., 375), and, as has been shown, the manner of its exercise is a matter of legislative discretion and can not be controlled by the courts (*Cherokee Nation* v. *Hitchcock*, 187 U. S., 308; *Lone Wolf* v. *Hitchcock*, id., 565).

Its unconstitutionality is asserted, however, on the ground that it is an attempt on the part of the legislative branch of the Government to disturb vested rights by setting aside the final decrees of a court of competent jurisdiction.

Upon this point the language of this court in *Stephens* v. *Cherokee Nation* would seem to be conclusive (174 U. S., 477–478):

> The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested

rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

And while it is undoubtedly true that legislatures can not set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (*Calder* v. *Bull*, 3 Dallas, 386; *Sampeyreac* v. *United States*, 7 Pet., 222; *Freeborn* v. *Smith*, 2 Wall., 160; *Garrison* v. *New York*, 21 Wall., 196; *Freeland* v. *Williams*, 131 U. S., 405; *Essex Public Road Board* v. *Skinkle*, 140 U. S., 334.)

The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort can not be questioned unless in violation of some prohibition of that instrument.

> In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reexamination by a higher court, though subsequently authorized by general law to exercise jurisdiction.

The principles thus announced are supported by the subsequent cases of *Cherokee Nation* v. *Hitchcock* and *Lone Wolf* v. *Hitchcock*, above cited.

The decision in the Stephens case, it will be observed, was confined entirely to a determination of the constitutionality of the legislation of Congress in respect to citizenship and the allotment of lands in the Indian Territory. Assuming, *without determining*, that the act of June 10, 1896, authorized the United States courts to review *de novo* the cases appealed from the Dawes Commission, the authority of Congress to authorize such a review was affirmed, and the legislation under consideration declared to be, in general, valid and constitutional. The question of notice was not even mentioned in the opinion in that case. The act of July 1, 1902, therefore, which provides for a spe-

cific inquiry by the Citizenship Court into the validity of the methods of procedure adopted by the United States courts in the citizenship cases appealed thereto from the Dawes Commission, and for a review of such cases upon their merits, in no way affects the judgment in the Stephens case. In fact, it but supplements the action of this court in that case, and merely serves to complete the purpose of Congress—manifest through all its legislation—to have "the very right" of this controversy determined.

V.

The writ of certiorari being asked merely in aid of the writ of prohibition, must be denied *pro forma*, no grounds for the issuance of the latter writ being presented.

HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1903.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 12, Original.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

FILED AUGUST 24, 1903.

1 In the Supreme Court of the United States, October term, 1902.

Number 14, Original.

EX PARTE: IN THE MATTER OF U. S. JOINS, PETITIONER.

Reply, Answer and Return to the Rule and Order to them issued, of Spencer B. Adams, Chief Judge; Walter L. Weaver, Associate Judge; Henry S. Foote, Associate Judge, and James B. Cassada, Clerk of the Choctaw and Chickasaw Citizenship Court, to show cause why writs of prohibition and certiorari should not be granted against them as prayed for by the petitioner.

And now comes Spencer B. Adams, chief judge; Walter L. Weaver, associate judge; Henry S. Foote, associate judge, and James B. Cassada, clerk of the Choctaw and Chickasaw Citizenship Court, and by way of reply, answer, and return to the rule and order to them issued by this honorable court on the 23rd day of March, A. D. 1903, to show cause before said court, at the city of Washington, on Monday, the 19th day of October, 1903, at 12 o'clock noon of that day, or as soon thereafter as counsel "can be heard," why writs of prohibition and certiorari should not be granted against them and each of them, as prayed for in the petition of U. S. Joins, filed in said court at the October term, 1902, thereof, on the 6th day of March, 1903, respectfully submit that the petitioner should not be granted the relief prayed for:

1. Because the case of the Choctaw and Chickasaw nations or tribes of Indians against J. T. Riddle and others, referred to in the notice of said respondents by said petitioner that he would on the 13th
2 day of March, 1903, or as soon thereafter as counsel could be heard, ask leave to file his said petition against them praying for writs of prohibition and certiorari, and upon which the rule and order to show cause was made by this honorable court on the 23rd day of March, 1903, was finally determined by said Choctaw and Chickasaw Citizenship Court on December 17th, 1902, the opinion therein having been rendered by said court on that day, and the judgment therein, in accordance with said opinion, having been duly given, rendered, made, and filed, and delivered to the Commission to the Five Civilized Tribes on January 15th, 1903; when in truth and in fact the case now pending against respondents in this honorable court, viz, "No. 14, original, October term, 1902, ex parte, in the matter of U. S. Joins, petitioner," in which the said Joins seeks to have this honorable court issue a writ of prohibition against the Choctaw and Chickasaw Citizenship Court, prohibiting it from certifying its judgment in the test case, known as the Riddle case, was not instituted until the 6th day of March, 1903, long after said test case, known as the Riddle case, had been finally determined and judgment rendered, filed in court, and certified as aforesaid.

By reference to the act of Congress approved July 1, 1902 (32 Stats. at Large, page 641), it will be seen that in providing for the trial and determination of the said test suit the Choctaw and Chickasaw Citizenship Court was given no further power in that behalf and matter and test suit than to give, make, and render judgment upon the two points

in said act provided for, and that the determination of either of said points in favor of said nations or tribes necessarily declared the
3 citizenship judgments rendered by the United States courts in the Indian Territory, for the central and southern districts thereof, null and void; said Joins, among others, having such a judgment thus affected.

A copy of the opinion of the Choctaw and Chickasaw Citizenship Court in said test suit is hereto attached, marked "Exhibit A."

There is nothing in the judgment of said Citizenship Court in the test case, known as the Riddle case, nor did or does the law in that behalf authorize said court to include or place in said judgment anything, by any command or order of said Citizenship Court, to affect or control the acts, or any act, or conduct of the Commission to the Five Civilized Tribes, and therefore, when that judgment was certified by said Citizenship Court, as a matter of advice merely, and not of command, to the Commission to the Five Civilized Tribes, the whole matter had passed beyond the jurisdiction and control of the Citizenship Court, so far as the said test suit was and is concerned, as nothing further remained to be done in respect thereto by said Citizenship Court, as not even an execution for costs could be issued, the officers of said court being prohibited from charging or collecting any costs, and the marshal's fees and those of witnesses were and are to be paid by the respective parties, and in advance, and furthermore no provision exists or was made by the law creating said court for the issuance of any execution for costs.

2. Because after said Joins had instituted the proceeding by petition herein, he, on the 10th day of March, 1903, voluntarily instituted his suit in said Citizenship Court, by way of appeal as provided in the act of July 1, 1902, aforementioned, asking and praying said court
4 to assume jurisdiction thereof and to try his said case on its merits as provided in said act of July 1, 1902, and as amended March 3, 1903, entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," which became a law on said last-mentioned date, and now, after having so proceeded to pray this Citizenship Court to try his case on the merits, and the same still remains, as prayed for by him, on the docket of said Citizenship Court, and at issue, he persists in his efforts to have this honorable court issue an extraordinary writ or writs to prevent the Citizenship Court from trying the very case which he has prayed it to hear, try, and determine, the same having been instituted voluntarily and freely by him and still remaining for trial on said docket of said court.

3. Because the said Choctaw and Chickasaw nations or tribes of Indians have, in accordance with its provisions, ratified the said act of July 1, 1902, by their vote at a legal election held on the 25th day of September, 1902, and the provisions of the agreement and treaty between the United States and said nations or tribes of Indians, created the Citizenship Court, the same being both an act of Congress approved by the President of the United States and a treaty ratified not only by the authorized treaty-making body of said tribes, but by the individual

members of both the said tribes on the 25th day of September, A. D. 1902. And inasmuch as the petitioner is necessarily an Indian, claiming rights as such, or nothing, for the purpose of this proceeding, he is bound by the acts of his tribe, of which he claims to be a member, in voting for and thereby ratifying, in all respects, said agreement and treaty.

If the petitioner is, as he claims, an Indian, he is absolutely under the control of the political power of the Government of the United States, and bound by the acts of Congress, and still further bound by the acts of the tribe of which he claims to be a member, by means of both of which agencies the Citizenship Court was brought into existence.

The tribes referred to above have voted to ratify the agreement and treaty, and thereby confirmed the validity of the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and the petitioner is forever bound thereby.

The petitioner has voluntarily and of his own free will and accord sought the jurisdiction of the Choctaw and Chickasaw Citizenship Court, and prayed that court to adjudicate and determine his rights on their merits. It is within his power, at any time, to rid himself of any action on the part of the said Citizenship Court in the premises, by dismissing his suit, and declining further to invoke the jurisdiction of that tribunal, and withdrawing from its power and control any adjudication in that behalf, thereby exercising his right to a speedy remedy to avoid its jurisdiction and adjudication.

The petitioner has placed himself in, and remains in, the attitude of a litigant seeking to have the Choctaw and Chickasaw Citizenship Court adjudicate his rights, and then attempts in this proceeding, when such adjudication is about to take place, to have this honorable court prohibit the action of the Choctaw and Chickasaw Citizenship Court, whose jurisdiction and action he has prayed for, under the act of July 1, 1902, and the amendment of March 3, 1903, aforementioned.

Wherefore it is respectfully submitted that the petitioner is not entitled to any relief at the hands of this honorable court.

SPENCER B. ADAMS,
Chief Judge.

WALTER L. WEAVER,
Associate Judge.

HENRY S. FOOTE,
Associate Judge.

JAMES B. CASSADA,
Clerk of the Choctaw and Chickasaw Citizenship Court.

7 EXHIBIT A.

In the Choctaw and Chickasaw Citizenship Court sitting at South McAlester, in the Indian Territory.

December term, 1902.

THE CHOCTAW AND CHICKASAW NATIONS OR Tribes of Indians, plaintiffs,
vs.
J. T. RIDDLE, ET ALS., defendants.

This is a proceeding instituted in this court by the Choctaw and Chickasaw nations or tribes of Indians, against the defendant, J. T. Riddle, and nine others, who are similarly situated. The plaintiffs filed a bill in equity in this court, by virtue of section 31, of an act entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes, approved July 1, 1902, said section being as follows:

"It being claimed and insisted by the Choctaw and Chickasaw nations that the United States Courts in the Indian Territory, acting under an act of Congress, approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such
8 courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately, and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court, hereinafter named, seek the annullment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship, or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit, as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be

confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any
9 charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory, was wrongfully obtained as provided in the next section. In the event said citizenship judgments, or decisions, are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and upon the filing in such citizenship court of the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

The plaintiffs, after setting out in their bill that certain lands, situated in the Indian Territory and embracing that portion known as the Choctaw and Chickasaw nations, as belonging to these two tribes, and that by virtue of treaty stipulations heretofore entered into on the part of the United States and these two tribes of Indians, said lands are held in common by the members of these two tribes, and they further allege that these ten defendants, and several thousands of others similarly situated, have been admitted and placed upon the rolls of these two nations
10 as Indian citizens, by virtue of certain alleged judgments or decrees of the United States courts, for the central and southern districts of the Indian Territory, under the act of Congress approved on the 10th day of June, 1896; and by virtue of these said judgments these defendants, and all of those similarly situated, are insisting upon enforcing said alleged judgments or decrees, and if same are enforced by allotment to them of an equal share of the lands and moneys of said tribes, it will wrongfully deprive the members thereof of property to the value of many millions of dollars, and thereby proportionately decrease the share which each member would otherwise receive.

The plaintiffs further allege, that all of the judgments of the said United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, are illegal and void; that no valid judgments, affecting said lands and moneys, could in any event, have been rendered without notice to both of said nations, or tribes; and further allege that in no case in which judgments were rendered purporting to admit any of said defendants to citizenship in either of said nations or tribes was notice given of the pendency of said proceedings to each of said nations or tribes, and that in no case was judgment taken against both of said nations, or tribes; and that due and lawful notice to each of said nations, or tribes, was indispensable to the rendition of valid judgments. Plaintiffs further allege, that the proceedings in the United

States courts in the Indian Territory, under said act of Congress approved June 10, 1896, in the rendition of said alleged decrees, should have been confined to a mere review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and that said court should not have tried said cases de novo, and that the action of said courts in trying said cases de novo, and in rendering the alleged judgments, was illegal and void; and
11 that all of said evidence of a documentary nature, which has become a part of the record of said courts in said cases, was unlawfully taken, and that for that reason all of said proceedings are of no force and effect. Plaintiffs further allege that they have no adequate remedy at law by which they can redress the great wrong threatened them, and they therefore pray this court to enter its decree, declaring all such judgments rendered by the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, illegal and void, and ask this court to declare the proceedings of said court in trying said cases de novo, in which said judgments were rendered upon appeal from the Commission to the Five Civilized Tribes, illegal and void, and of no force and effect, etc. The plaintiffs further attach to their bill in equity a judgment rendered by the United States court for the central district of the Indian Territory in the case of Elizabeth Casey et al. against the Choctow Nation, a party who obtained judgment under the act of June 10, 1896. The attachment is marked "Exhibit A," and they ask that it be taken as a part of their complaint, as bearing out their contention that only one nation was served with notice, and that the judgments were taken against one nation alone.

This judgment is as follows:

EXHIBIT A.—*Copy of order of court.*

UNITED STATES OF AMERICA,
Indian Territory, central district, ss:

In the United States court in the Indian Territory, central district, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 24th day of August, A. D. 1897, present, the
12 Honorable Wm. H. H. Clayton, judge of said court. The following order was made and entered of record, to wit:

ELIZABETH CASEY ET AL. *vs.* CHOCTAW NATION. } 25. Judgment.

On this 24th day of August, 1897, this cause came on to be heard upon the pleading and evidence produced herein, and the court being well and sufficiently advised in the premises, doth find as follows:

That Elizabeth Casey, aged 58 years; her son, John Casey, aged 25 years; her son, Joshua Casey, aged 23 years; her daughter, Phebe Garrett, aged 37 years; her grandson, Wm. Garrett, aged 19 years; her grandson, John Garrett, aged 16 years; her grandson, Jesse Garrett, aged 12 years; her granddaughter, Dora Garrett Cheatam, aged 17 years; her granddaughter, Mandy Garrett, aged 4 years; her great-granddaughter, Venice Cheatam, aged 1 year; her granddaughter, John Ann Casey, aged 16 years, are Choctaw Indians by blood and have been born and reared in the Choctaw Nation, and are citizens and residents of

the Choctaw Nation, and that all of said persons are entitled to be enrolled on the citizenship roll of the Choctaw Nation, and as such citizens they and each of them are entitled to all the rights, privileges, benefits, and immunities of Choctaw citizens of said Choctaw Nation, and all such rights and privileges are hereby decreed to them.

It is further ordered and adjudged by the court that the decision of the Commission to the Five Civilized Tribes of Indians, by which the application of the parties appellant was denied, and from which decision these appellants appealed as provided by law, be, and the same is hereby, reversed, and it is ordered by the court that said Commission shall
13 put the names of these appellants on the rolls prepared or to be prepared by it, of citizens of the Choctaw Nation by blood.

It is further ordered by the court that the clerk of this court transmit under his official seal to the said Commission for the Five Civilized Tribes of Indians a true copy of this judgment, which said certified copy shall operate and be taken as a mandate from this court to said Commission.

It is further ordered and adjudged by the court that these appellants have and recover of and from the Choctaw Nation all their costs in this behalf expended.

(Endorsements.)

The within is a true copy from the record of an order made by said court on the 24th day of August, A. D. 1897.

(Signed) E. J. FANNIN, *Clerk*

Filed September 6, 1897.

H. M. JACOWAY, *Sec'y.*

No. 75–2.

No. 25—E. Casey et al. vs. Choctaw Nation. Copy of order of court.

MUSKOGEE, I. T., *Sept. 24, 1902.*

I, Tams Bixby, acting chairman of the Commission to the Five Civilized Tribes, do hereby certify the foregoing to be a true copy of a certified copy of an order made by the United States court in Indian Territory, central district, South McAlester, I. T., on the 24th day of August, A. D. 1897, in the case of Elizabeth Casey et al. vs. Choctaw Nation, No. 25, as the same appears on file with the records of the Commission to the Five Civilized Tribes.

(Signed) TAMS BIXBY,
Acting Chairman.

Defendants filed an answer to the plaintiffs' bill in equity, in
14 which they admit the judgments described in said bill in equity were rendered by the courts mentioned in said bill in equity, under and by virtue of the act of Congress approved June 10, 1896, but deny that said judgments are illegal and void. They admit that only one nation was served and that the judgments were taken against only one nation, but insist that both of said nations were not necessary parties, and that it was not necessary to serve notice of the pendency of said suits, or the notice of application for such citizenship presented to the Commission of the United States to the Five Civilized Tribes, from which appeal was taken to the said court.

Defendants further insist that under and by virtue of the act approved June 10, 1896, and all other laws and treaties between the Choctaw and Chickasaw nations, or tribes of Indians, that no notice was necessary to have been given to have prosecuted the application of the defendants for citizenship, and that no judgment against both of said nations was necessary and proper, under the law, to recognize the rights of these defendants in and to citizenship or status recognized or established by virtue of said judgments.

And answering the other allegations in the bill in equity, the defendants admit that the United States courts for the central and southern districts of the Indian Territory, rendering such judgments, under the act of June 10, 1896, tried the cases de novo upon an appeal from the Commission to the Five Civilized Tribes, known as the Dawes Commission; but insist that that was the manner in which they should be tried, and deny that said judgments, by reason of the fact that said court heard evidence in addition to that heard before said Commission and tried said cases de novo, are irregular and illegal, and deny that such trials de novo rendered such judgments void, as alleged in said bill in equity. The defendants admit the material facts alleged in the plaintiffs' bill,
15 but insist that upon the facts as alleged, these are valid judgments. They contend in their pleadings, as well as in their arguments, that, under the act of June 10, 1896, authorizing the Dawes Commission to hear and determine the application of all persons who might apply to them for citizenship in said nations, it was necessary to give but one nation notice, and that the trials should have been had de novo, as they were had, before the United States courts.

By virtue of the provision of section 31 of the act of July 1, 1902, Polly Hill and numerous other parties, who claim that they are similarly situated to the ten defendants named in the original bill, upon their application, were made parties to this proceeding, all of them filing answers to the bill, and, as I understand, admit in their several answers that notice was not served on but one nation, and that the trials in the United States courts for the Indian Territory, upon appeal from the Commission to the Five Civilized Tribes, were de novo.

The attorneys representing the plaintiffs and the attorneys representing the defendants in the original action, as well as those attorneys who represent parties who are similarly situated and in consequence thereof, came in and made themselves party defendants, filed in this court the following stipulation:

In the Choctaw and Chickasaw citizenship court, sitting at South McAlester, December term, 1902.

THE CHOCTAW AND CHICKASAW NATIONS or tribes of Indians, plaintiffs,
vs.
J. T. RIDDLE ET AL., DEFENDANTS.

STIPULATION.

Comes the plaintiffs, the Choctaw and Chickasaw nations, by
16 Mansfield, McMurray & Cornish, their attorneys, and comes J. T. Riddle and the nine other representative defendants, named

in the bill of plaintiff herein as representatives of all other persons similarly situated, by C. B. Stuart, C. C. Potter, J. G. Ralls, W. A. Ledbetter, A. C. Cruse, Thomas Norman, J. C. Thompson, Sylvester Mullen, C. L. Herbert, and Charles McPherren, their attorneys, and file this their stipulation, agreeing that this court may consider as before the court for consideration, the constitution of the Choctaw and Chickasaw nations or tribes of Indians and all their printed laws passed by their legislatures or general councils from time to time, together with all the treaties made and entered into by said tribes with the United States of America and the rules of the Commission to the Five Civilized Tribes in 1896. This stipulation, however, shall not be taken as an admission of either party plaintiff or defendant, as to the validity of any of said constitutions or legislative acts of the Choctaw or Chickasaw nations or of any of the treaties aforesaid, it being intended that all proper exceptions to the legality of any of said matters so judicially taken notice of, shall be open for argument and discussion by either party.

Attorneys for plaintiffs: Mansfield, McMurray & Cornish.

Attorneys for defendants: C. B. Stuart, A. C. Cruse, W. A. Ledbetter, C. L. Herbert, C. C. Potter, J. G. Ralls, Chas. S. McPherren, T. W. Neal, Warner & Buckley, Harley & Lewis, Thomas Norman, J. C. Thompson, and Sylvester Mullen.

Opinion by ADAMS, C. J.:

It will be seen by reference to section 31, of the said act set out in the statement of the case that, so far as this suit is concerned, this court is limited to the consideration of two legal propositions and two
17 alone, and it is expressly confined to these two propositions, to wit: Whether, under the act of Congress, approved June 10, 1896, notice to each of said nations was indispensable; and, second, whether or not the proceedings had in the United States courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the acts of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission. The pleadings and arguments admit there was but one nation served with notice, and also that the trials were de novo. Then we come to the consideration of the questions, Was it indispensable, under the act of June 10, 1896, to give both nations notice, and should the trials have been de novo, or confined to a review of the action of the Dawes Commission?

We will take these questions up in the order in which they come.

First. Was notice, under act of June 10, 1896, indispensable? That is the issue plainly stated. To arrive at an intelligent conclusion of this matter, we deem it right and proper, in considering the meaning of the act of June 10, 1896, to consider why this act was passed. What wrongs did Congress intend to correct, if any? And what remedies, if any, it sought to apply? In considering this we shall look at the legislation that Congress had enacted prior to that time upon this subject, for the purpose of determining why the act of June 10, 1896, was passed, and also what these judgments that were obtained under this said act conferred. What were they dealing with? We shall also take into consideration, in determining these matters as to whether these nations both should have been parties, what rights these judgments conferred, and, whether, as a consequence of these judgments, the parties who

obtained them were entitled to such rights in the property belonging to both nations as would require notice to both nations, in dealing with their property.

18 On March 3, 1893, Congress of the United States passed an act authorizing the President to nominate, and by and with the consent of the Senate, to appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw and Chickasaw nations, the Muskogee or Creek Nation, and the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any land within the Territory now held by any or all of said nations, or tribes, either by the cession of same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the several nations, or tribes, respectively, as might be entitled to the same; or by such other method as might be agreed upon between the several nations, or tribes, aforesaid, or each of them, and the United States, with a view of such adjustment, upon a basis of justice and equity, as might, with the consent of said nations or tribes of Indians, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a State of the Union, which shall embrace the lands within said Indian Territory. In that act Congress declared the purpose of creating this commission, and to carry out this purpose it enacted that such commission, under such regulations and directions as should be prescribed by the President, through the Secretary of the Interior, should open negotiations with the several nations of Indians, as aforesaid, in the Indian Territory, and should endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each of said nations, tribes, or bands, respectively, as may be agreed upon as just and proper, and to provide for each of said Indians a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be suited to the circumstances under the terms of said agreement; second, to procure the cession, on such terms as shall be agreed upon, of lands not found necessary to be allotted or divided, to the United States.

19 Congress further provided in this same act, that the commissioners—meaning the Dawes Commission—should, from time to time, report to the Secretary of the Interior the progress of its negotiations.

So, we are at once to conclude that the purpose of this act was to send three disinterested persons here as representatives of the Government to negotiate with these five tribes and get them to agree, if they could, to an allotment of these lands, so that each Indian would hold his share in severalty, and thereby have a home; and with the ultimate result of creating a State.

This was the purpose, for Congress has stated as much in the act. We have a right to assume these Commissioners discharged their duty; that they came here and attempted to negotiate with the Five Tribes and made their report to the Secretary of the Interior as they were directed. We find in the statement of the case of Stephens et als. vs. Cherokee Nation, which is found in the 174th U. S., page 445, that the Dawes Commission did make reports to the Secretary of the Interior from time to time. On November 20, 1894, and November 18, 1895, the Commission made reports to Congress of the condition of affairs in the Indian Territory in respect of the manner in which lands were held

by the members of the tribes, and the manner in which citizenship of both tribes was dealt with, finding a deplorable state of affairs, and the general prevalence of misrule.

In the report of November, 1895, the Commission, among other things, said:

"It can not be possible that in any portion of this country government, no matter what its origin, can remain peaceable for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are, therefore, responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the Territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and if left without interference will break out in revolution."

20

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship and the manipulation of the rolls and procedure in Indian tribunals, said:

"The Commission is of the opinion that if citizenship is left, without control or interference, to the absolute determination of the tribal authorities, with power to decitizenize at will, great injustice will be perpetrated and many good and law-abiding citizens reduced to beggary. And, further, the Commission is compelled to report: that so long as power in these nations remains in the hands of those now exercising it, further efforts to induce them by negotiations to voluntarily agree upon a change that will restore to the people the benefit of tribal property, and that security and order and government, enjoyed by the people of the United States, will be in vain."

We have a right to assume that Congress, in view of these official reports that had just been made to it, with all of these conditions in mind, and also with the purpose of allotting these lands, by passing such legislation as would insure rights to those who were entitled to same, passed the act of June 10, 1896, which is as follows:

"ACT OF JUNE 10, 1896.

"For salaries and expenses of the Commissioners appointed under act of Congress, approved March 3, 1893, and March 2, 1895, to negotiate with the Five Civilized Tribes in the Indian Territory, the sum of forty thousand dollars, to be immediately available; and said Commission is directed to continue the exercise of the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and to report from time to time to Congress.

21

"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled: Provided, however, that such an application shall be made to such Commissioners within three months after the passage of this act.

The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nation or tribe; and, provided further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers,
22 and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken, where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong; and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, that if the tribes or any person be aggrieved with the decision of the tribal authorities or of the Commission provided for in this act, it or he may appeal from such decision to the United States district court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, at the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this act, and said rolls shall be and are hereby made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members, as they finally approve them, with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the list of members to be filed with the Commissioner of Indian Affairs; and said Commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount, and value of the property leased, and the amount received therefor, and by whom and from whom said property is leased, and is further
23 directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

"It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory, and afford

needful protection to the lives and property of all citizens and residents thereof."

We have set out the act of June 10, 1896, fully, because we will have many occasions to revert to it in the consideration of these questions. Before we determine whether notice was indispensable to both nations under that act, we deem it proper to determine what rights were conferred by these judgments; and, if any rights at all, were they such property rights as required notice to both nations? Whether these judgments simply conferred a bare contingent right, that did not mean anything, or whether they did or did not carry with them the right to participate in the tribal property ultimately. (Now, it is conceded by all parties that these persons who obtained their citizenship by virtue of these judgments, under the act of June 10, 1896, acquired all the rights, and were entitled to all the benefits, of those Indian citizens whose citizenship was not in question.)

To determine this question we will see how these lands are held by the Choctaw and Chickasaw tribes, and in doing this we deem it proper to trace their title.

By virtue of stipulations contained in the treaty of 1830, between the United States and the Choctaw Nation or tribe of Indians, and, in lieu of certain property owned by the Choctaw Nation east of the Mississippi River, the United States, through the then President, John Tyler, after reciting some of the causes that led up to the treaty of 1830, made the following grant to the Choctaw Nation:

24 GRANT.

"To all to whom these presents shall come greeting:

"Whereas, by the second article of the treaty, began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th of February, 1831), by the Commissioners on the part of the United States, and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'The United States, under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation,' a tract of country west of the Mississippi River, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and to live on it: Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the western boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeable to the treaty made and concluded at Washington City in the year 1825.

"Now, know ye, that the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi River;' to have and to hold the same with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, as intended 'to be conveyed' by the

aforesaid article, 'in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it' liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand at the city of Washington, the twenty-third day of March, in the
25 year of our Lord one thousand eight hundred and forty-two, and of the Independence of the United States the sixty-sixth.

"By the President,

"JOHN TYLER.

"DAN'L WEBSTER,
"*Secretary of State.*

"JOHN C. SPENCER,
"*Secretary of War.*

"T. HARTLEY CRAWFORD,
"*Commissioner of Indian Affairs.*

"Recorded. Volume I, page 43.

"J. WILLIAMSON,
"*Recorder of the General Land Office.*

"Executed in the Bureau of Topographical Engineers.

JOHN J. ALBERT,
"*Col., Corps T. Engineers.*"

Then, in 1837, a treaty was made by the Choctaw and Chickasaw nations, and in Article I of the treaty we find this language:

"It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country" (evidently meaning the country that had been granted to the Choctaws by virtue of the treaty of 1830) "to be held on the same terms that the Choctaws now hold, except the right of disposing of it which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation."

In Article III of the same treaty we find this language:

"The Chickasaws agree to pay to the Choctaws, as a consideration of these rights and privileges, the sum of five hundred and thirty thousand dollars," etc.

26 Then we find, in 1855, a treaty entered into by and between the United States and the Choctaw and Chickasaw tribes of Indians. (This seems to be the first treaty made where the United States and the Choctaw and Chickasaw nations were all parties.) It seems by the preamble of that treaty that strife and dissension had sprung up between the two nations.

In Article I of the treaty of 1855 is found the following:

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country."

And then we find this language in the same article:

"And pursuant to an act of Congress, approved May 28, 1830, the United States do hereby forever secure and guarantee the lands

embraced in the said limits to the members of the Choctaw and Chickasaw tribes, and heirs and successors, to be held in common, so that each and every member of either tribes shall have an equal and undivided interest in the whole."

And we find this provision therein:

"Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

Then article two of this same instrument sets apart a district for the Choctaws, giving the boundaries thereof; and article three provides that the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district.

Article five provides that the members of either the Choctaw or Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges, and immunities of citizens thereof. Article eight provides that, in consideration
27 of the foregoing stipulations, and immediately upon the ratification of this convention, there shall be paid to the Choctaws, in such manner as their national council shall direct, out of the national fund of the Chickasaws held in trust by the United States, the sum of one hundred and fifty thousand dollars. And, in consideration of the relinquishment of claims to lands held by these two nations west of the Mississippi River, the United States, in article ten of said treaty, agrees to pay the Choctaws the sum of six hundred thousand dollars, and the Chickasaws the sum of two hundred thousand dollars; and by article fourteen of this treaty of 1855 the United States further agrees to protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons in opposition to their jurisdiction and laws.

In 1866 another treaty was entered into by the Choctaws and Chickasaws and the United States by which the Choctaws and Chickasaws jointly ceded to the United States Government a part of the territory that had been conveyed to them by grant in consideration of three hundred thousand dollars paid by the United States to the two nations. Article six of the treaty of 1866, providing a means by which a right of way through these lands should be acquired, expressly stipulates that the price to be paid for the lands taken for such right of way should be agreed upon between the Choctaw and Chickasaw nations and the company or companies seeking such right of way and to be approved by the President of the United States.

In article eleven of the treaty of 1866 this provision is found:

"Whereas the lands occupied by the Choctaw and Chickasaw nations and described in the treaty between the United States and the said nations of June 22, 1855, is held by the members of said nations in common under the provisions of said treaty; and whereas it is believed that the holding of said land in severalty," etc.

28 In article fifteen of the same treaty, after providing for the selection of seats of justice and lands for the endowment of schools, colleges, etc., this language is found:

"* * * At the expiration of a time therein named the selection

which is to change the tenure of land in the Choctaw and Chickasaw nations from a holding in common to a holding in severalty. * * *"

In article seventeen of the treaty of 1866, after providing that the missionaries who had come to this country should not be deprived or interferred with in the continued occupation of their several missionary establishments, and providing further that should any missionary who had been engaged in missionary labor for five consecutive years prior to this treaty in the nations, or either of them, or three consecutive years prior to the civil war, and who, having absented himself from said nation may desire to return, it is provided that such missionary be allowed to select a quarter section of land for a permanent home for himself and family. And in the same article granting lands to religious societies and denominations it is provided that no land therein granted shall ever be sold or otherwise disposed of without the consent of both nations and the approval of the Secretary of the Interior.

So it will be seen that in the treaty between the two nations in 1837 it is expressly provided that lands shall be held in common by the two nations. By the treaty of 1855, between the two nations and the Government, it is expressly provided that such lands shall be held in common, with this further explanatory provision, "so that each and every member of either tribes shall have an equal, undivided interest in the whole," with a further provision that no part thereof should be sold without the consent of both tribes. And in the treaty of 1866 the same conditions and limitations are incorporated as were in the former treaties referred to.

29 It is a significant fact that in all these treaties, wherever land is mentioned, it is expressly provided that it is held in common by these two tribes. It is a further significant fact that wherever any provision is made for any disposition of the lands it is provided that the price to be paid for same should be agreed upon between the two nations, and the disposition of any of the lands, before taking place, is to be agreed upon by the two nations. Even in the lands donated to the missionaries, who came here and administered to the spiritual needs of the Indian and endured hardships, perils, and dangers incident to such residence at that time, the Indian, while recognizing that wholesome gratitude that must be commended, was so cautious as to the distribution of his property, ingrafted into that treaty that the lands therein granted should not be disposed of except by and with the consent of both nations. When the United States purchased a part of their territory, under the treaty of 1866, it purchased the same not from the Choctaws alone, nor from the Chickasaws alone, but from the Choctaws and Chickasaws, and paid the two tribes therefor three hundred thousand dollars.

We have set out the provisions of these different treaties because we consider it important; and, after a careful consideration of the provisions of these treaties and the legislation above referred to, is there any questioning the fact that this land is held in common by these two tribes, and that each and every member of these two tribes of Indians own an equal, undivided interest in the lands conveyed under the treaty of 1855, and which is now conceded to be all the lands embraced in the territory known as the Choctaw and Chickasaw Nations, in the Indian Territory, except that part heretofore disposed of by them; and the further fact

that no part thereof has ever been disposed of without their joint consent? These treaties mean that or they do not mean anything.

30 That question being settled, our next inquiry is, what rights, if any, did these judgments confer? It is contended by the defendants in this case that they did not confer such rights of property as would require those who were to be affected by the judgments to have notice of the proceedings. We have shown by the legislation of Congress, heretofore set out, the great purpose of Congress in sending this Commission to the Indian Territory, known as the Dawes Commission, was to negotiate with the Indians looking to an allotment of the lands to the individual Indian in severalty, so that a State might be ultimately created, and to secure to each and every Indian in these two nations a sufficient quantity of land to meet his needs. This legislation further shows that this Commission could not form any agreement with the Indians that would accomplish that purpose. The Commission reported these facts to Congress, and the act of 1896 was passed, we may assume, in consequence of these reports.

The Commission, under this act, was authorized and directed to proceed at once to hear and determine the application of all persons who might apply to it for citizenship in any of the said nations, and, after such hearing, they shall so determine the rights of said applicants to be admitted and enrolled. It was necessary before the allotment took place that the applicant should be admitted as a citizen of either one of these tribes; if he was a Choctaw, he must be admitted as a Choctaw citizen; if a Chickasaw, he must be admitted as a Chickasaw citizen; and then, after he was admitted, the act directed that the Commission should put him on the roll. We might ask the question, What was the purpose of this? Why should he be admitted as a citizen and placed on the rolls? Did the Congress of the United States pass this act simply to allow a man to be admitted as an Indian citizen when it conferred no rights? Was it simply to subject the applicant to tribal laws, etc., or did

31 it pass this act for the purpose of seeing who the real Indian was, and placing him on the rolls, so the allotment might take place and the lands be divided in severalty, as it had expressed in the legislation above referred to, was its great desire?

When the applicant was admitted he was placed on the rolls, and then he became entitled to all benefits enjoyed by the Indian whose rights were not in question. Then, did he not become entitled to his individual interest in the common estate as soon as the same was allotted? We are forced to answer this question in the affirmative.

It is admitted by the defendants that these various parties who were admitted to citizenship under these judgments are now in possession of large tracts of land that belong to these two nations. They have enjoyed the benefits, the rents, and profits of these lands since the rendition of these judgments; and they went into possession of same by virtue of the judgments so obtained under the act of June 10, 1896. Then, we might ask, How can it be contended that these judgments did not confer property rights?

Upon the question as to the rights conferred by the admission of a person as a citizen of these two tribes, the learned judge of the central district of the Indian Territory, who tried these cases in said district under

the act of June 10, 1896, in his opinion in the case of F. R. Robinson vs. Choctaw Nation, when he came to discuss the rights of a white man who had been admitted to citizenship by virtue of marriage with an Indian woman, uses this language: "The marriage had vested a title to the lands in him."

Also the learned judge of the southern district of the Indian Territory, who tried these citizenship cases under the act of June 10, 1896, supra, when he came to discuss what rights were conferred upon an United States citizen by his marriage to a Choctaw or Chickasaw woman, and
32 thereby acquiring citizenship in the tribe, uses this language: "Besides, it (meaning marriage) is supposed to carry with it certain property rights."

Chief Justice Fuller says in the Stephens case, above referred to, "these are not absolute vested rights," but we are bound to conclude that they were such rights as gave the applicant, when he was admitted and enrolled, rights in common property. Then, if that be true, was he seeking such right when he made application as would require, under the law, notice to the adverse party, or those who held the property in common, that their property was about to be diminished? that an estate was about to be carved out of the whole? In fact, was not enrollment, as here involved, but a step, and a vital one, looking to the partition or condemnation, so to speak, of a part of the common property of the two nations, the Choctaws and the Chickasaws?

We understand the general rule in equity cases, with reference to parties, to be in accordance with the fundamental principals of justice, that all persons interested in the object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit. (Exceptions to this rule have been admitted, none of which apply in this case); but in every case there must be such parties before the court as to insure a fair trial of the issues in behalf of all. (McArthur vs. Scott, 113 U. S., page 1031.)

All who are interested in the decree shall be made parties to the proceedings, but the rule is not without exceptions, and it does not apply where parties can not be found, and where great inconvenience would result from its application. Where a person is interested or involved in a suit he should be made a party. (Danbridge vs. Washington, Ex., 2 Peters, p. 454.)
33 In other words, we understand the rule to be, all those whose presence is necessary to a correct determination of the entire controversy must be made parties.

Justice Livingston, in delivering the opinion of the court in the case of Marshall vs. Beaverly, 5 Wheat., 313, uses this language:

"It is not the course of courts of equity to make a decree which is operative directly upon the parties in interest without affording them an opportunity of being heard."

We could quote a great many decisions bearing out this principle, but it is a principle so well settled that we need not spend any time thereon.

Here is a large body of land belonging to these two tribes: Congress, in its various acts, supra, said that it desired to allot this land in severalty. Was the Choctaw Nation interested in who was made a Chickasaw citizen? or, was the Chickasaw Nation interested in who was made a Choctaw citizen? Most assuredly it seems to us they were. The natural

effect of these judgments was to deprive them of a part of their lands; then, under the well-established principles of law, was it not necessary, when the applicant came and presented his application, and an allowance of same, and putting him on the rolls, had the effect of his sharing in the distribution of these lands, then, naturally, why was he not interested in these proceedings so vital to his rights?

The counsel for the defendants contend that the proceedings in this case were on a parallel with the proceedings for naturalization. We can see no kinship between the two. The defendants contend that the decree of the court declaring a person a citizen under the naturalization laws entitled him to preempt land and acquire a homestead in the public
34 domain. That may be true. The Government is then dealing with its own property, and the rights of no third parties intervene, but here the Government is dealing with its wards and with people who own this property. The Government of the United States has not only given them a grant to it, but by solemn treaty has said: "This is your property; hold it in common. It is yours as long as you and your heirs exist, unless you abandon the same." The Government has not only said this to the Indian, but further, that it will protect him from other Indians and white people who attempt to invade his rights.

The defendants argued with considerable earnestness that under the act of June 10, 1896, if notice was necessary to either nation, notice to one was sufficient, and that service on both nations was not necessary, because citizenship had been conferred by each of these nations without the concurrence or intervention of the other, and that the act of June 10, 1896, directed the Dawes Commission that in determining all such applications the Commission should respect the laws of the several nations or tribes. That contention is met by the conceded fact that these nations had become so corrupt, and many people who were entitled to citizenship had been deprived of their rights, and that citizenship had been conferred upon those who were not entitled to it. The Congress of the United States, we have a right to assume, with a knowledge of these facts, and doubtless remembering the provisions of the treaty of 1855, stipulating that the United States Government shall protect these Indians in their rights from invasion of intruders, took from these tribes the right to confer citizenship and placed it in the hands of the agents of the Government, at the same time admonishing these agents to respect, in determining these citizenship questions, all laws of the several nations or tribes. Had Congress stopped there, there might have been some force in this contention, but it went further, and provided that
35 notwithstanding the Commission should respect the laws of the several nations or tribes, added "not inconsistent with the laws of the United States and all treaties with either of said nations or tribes." In other words, it directed the Commission to respect the laws of the several nations or tribes, provided the same were not inconsistent with the laws of the United States.

Now, was conferring citizenship by one nation, and thereby diminishing the property of the members of the other nation—that being the ultimate result—without any notice to that nation affected by the bestowal of such citizenship, inconsistent with the laws of the United States? Was that not depriving the members of that nation, who had a common

interest in the lands of both nations, of their property rights without due process of law? We are forced to the conclusion that it was.

Congress did not stop here, but it went further and provided and directed, in the act of June 10, 1896, the Dawes Commission, in the performance of such duties, shall have power and authority to administer oaths, to issue process and compel the attendance of witnesses, and to send for persons and papers and all depositions and affidavits, in any form whatsoever heretofore taken, where the witnesses giving such testimony are dead, or now reside beyond the limits of said Territory, and further directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, and to protect any of said nations from fraud or wrong. Congress, being so jealous of the rights of these "once powerful but now dependent people," enjoined upon this Commission to use every fair and reasonable means in determining the rights of citizenship or to protect the Indian from fraud or wrong. Was it not reasonable to serve notice on both of these nations, so they could have
36 come into court and contested the rights of those who were seeking to gain an interest in their common property?

As we have said before, the general rule is that all those whose rights are affected by the decree should be made parties to the action; that being true, we are forced to the conclusion that Congress did not intend to prescribe a different rule to be followed when dealing with a helpless and dependent people.

The defendants, in their learned and exhaustive argument, laid down this proposition, and seemed to place considerable stress thereon, that the act of June 10, 1896, in not providing for notice, was equivalent to a declaration by Congress that no notice was necessary in order to carry out its purpose in making a roll of citizenship in the tribes. We do not think that can be the law, but think, in the absence of a declaration in the statute upon this point, that Congress assumed, when it passed the act of June 10, 1896, and was silent upon this point, that the Commission, as well as the courts, would follow the well-established rules and principles of law in these citizenship proceedings that had been conferred upon the Commission and courts to determine. Congress directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong. Mark the language. How could they be protected when they were not given the opportunity of being heard when a part of their property was about to be taken?

The defendants insist that the Supreme Court in the Stephens case, above cited, held that Congress had the power to authorize the Commission to make the rolls in the manner provided for in the act, and that this is equivalent to a declaration by the Supreme Court in that case, that in making the rolls notice to the tribes was not indis-
37 pensable. In insisting upon this contention they, however, admit that the question as to whether notice had been given to both tribes, or either tribe, or as to whether such notice was necessary, was not presented to the Supreme Court. We assume, therefore, that the Supreme Court did not pass upon that question, and especially so when the learned Chief Justice, in delivering the opinion in the

Stephens case, expressly says in that opinion that the court had confined itself to the question as to the constitutionality or the validity of the legislation. If the question of notice had been presented to the Supreme Court, and that court had passed upon that question, of course this court would be bound by its decision.

It is admitted that the question as to whether notice was indispensable to both tribes in the proceedings under the act of June 10, 1896, *supra*, was never raised, either before the Dawes Commission or upon appeal to the United States district courts for the Indian Territory, and, in fact, was never raised in any legal proceeding except in this case.

We deem it just to the Dawes Commission, and also to the United States courts who tried these cases, to say this much.

In the answer of Julia London et als., filed in this cause, it is alleged that this court has no jurisdiction or power to entertain the bill for the purpose of setting aside, cancelling, and annulling the judgments of the United States courts for the Indian Territory, which are set forth in the bill in this case: and they deny that Congress had the right to pass the act of July 1, 1902. Hence they contend that the act of July 1, 1902, is in violation of the Constitution of the United States. These defendants, who set up this question in their answers, as well as many of the other defendants in this proceeding, filed a demurrer to the bill in this case, attacking the validity and constitutionality of this legislation, upon the same grounds as are set up in this answer.

38 After a full and exhaustive discussion of this matter, covering a period of five days, this court overruled the demurrer so filed, and all of them. Therefore, without going into a full discussion of this matter again, we now hold that Congress did have the right to pass the act of July 1, 1902, and every provision thereof; and that the same is not in conflict with the Constitution of the United States, or any of its provisions.

Having determined the first legal question involved in this proceeding, we now come to a consideration of the second proposition: Whether the proceedings in the United States courts in the Indian Territory, under the act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship.

The act of June 10, 1896, with reference to appeals in these cases from the Commission, known as the Dawes Commission, contained this proviso: "Provided, That if the tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this case, it or he may appeal from such decision to the United States district court: provided, however, That the appeal shall be taken within sixty days, and the judgment of the court shall be final." It will be observed that there is nothing in the statute itself, declaring in terms that such appeal shall be tried de novo, and, in fact, there is no prescribed mode of procedure specially set out in the act as to the matter of appeals. Then we are to determine what Congress meant when it said by the act of June 10, 1896, that the party aggrieved should have the right of appeal to the United States court; that is, what is meant by the word "appeal," accompanied by the other language of the act. In other words, what

39 kind of an appeal was applicable to the case in hand, as to the procedure to be pursued in determining the case in the appellate tribunal?

The defendants contend that, inasmuch as there was no provision in the act of June 10, 1896, requiring the cases not to be tried de novo, Congress, by the act of June 10, 1896, intended that the trials should have been de novo. In other words, that if Congress had intended that the United States courts for the Indian Territory, in the trial of these appeals from the Dawes Commission, should have been confined to a review of the case, it would have said so in the act itself; and they further contend that the only jurisdiction the United States courts had to try cases appealed to them was to try them de novo. In support of their contention defendants cite the practice of the United States courts in the Indian Territory with reference to appeals from mayors of incorporated towns and United States commissioners therein, showing that in all such appeals the trials are had de novo.

To pass upon this contention we deem it necessary to refer to the acts of Congress authorizing appeals from mayors and commissioners in the Indian Territory, for the purpose of ascertaining whether or not such acts of Congress prescribed how such appeals shall be tried when they reach the United States court, and in doing so we shall set out as much of these statutes as we think bear upon this point.

An act entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States courts in the Indian Territory, and for other purposes," was passed by Congress May 2, 1890, and is found in the United States Statutes at Large, vol. 26, chap. 182, page 81, in which, after providing for the appointment of commissioners and designating what the qualifications of these commissioners shall be, etc., we find this provision:

40 "The provisions of chapter 91 of the Laws of Arkansas regulating the jurisdiction and procedure before the justices of the peace are hereby extended over the Indian Territory. * * *"

And then, in providing how appeals shall be taken from these commissioners: "It is further provided, That appeals may be taken from the final judgments of said commissioners to the United States courts in the Indian Territory in all cases and in the same manner that appeals may be taken from final judgments of justices of the peace under the provisions of said chapter 91."

The chapter 91 which is referred to is found in Mansfield's Digest of the Laws of Arkansas; and in order to determine what procedure is prescribed in appeals from justices of the peace under the Arkansas Statutes, as set out in chapter 91 of Mansfield's Digest, we have examined that provision of the Arkansas law under the head of "Appeals" in that chapter. After providing that any person aggrieved by any judgment rendered by any justice of the peace, etc., and after providing how the appeals shall be taken, we find this provision:

"Upon the record of the justice being filed in the clerk's office the court shall be in possession of the case and shall proceed to hear, try, and determine the same anew, upon its merits, without any regard to any error, defect, or imperfection in the proceedings of the justice."

With reference to appeals from mayors we find the same provision as to appeals from justices; and it will be seen that in the case of appeals

from commissioners of United States courts in the Indian Territory the statute itself prescribes that the trials shall be de novo, and not confined to a review.

The defendants, in their oral arguments, as well as in their printed briefs, cite the case of the United States vs. Ritchie, 58 U. S.,
41 page 524, and seem to rely upon that decision largely in support of their contention, that Congress, by the act of June 10, 1896, intended that these appeals should be tried de novo, and the court should not be confined simply to a review of the action of the Dawes Commission. In fact, the judge for the central district of the Indian Territory seems to have based his authority to try these appeals from the Dawes Commission, under the act of June 10, 1896, upon the decision of the United States Supreme Court in the Ritchie case, supra. We think we are warranted in saying this from the language found in his opinion, as appears, beginning on page 110, in the report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, which is as follows:

"There are upon the dockets of this court, appealed from the Commission to negotiate with the Five Civilized Tribes, known as the Dawes Commission, two hundred and forty-one cases involving the right of citizenship in the Choctaw Nation of about two thousand five hundred applicants. All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued and by him overruled. It is not my purpose in these cases to disturb or go back and open up questions already decided, but to adopt the past rulings of the court and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases, the many suits brought by persons having a common interest and a common purpose against the same defendants, the difficulties of enforcing the rights by judgment of law, and the many equities claimed by both parties to these suits make them proper cases for a court of equity.

"The question of the jurisdiction of this court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, has seen fit to press this question or to point
42 out, either by brief or oral argument, the reasons for this contention. The statute giving the court jurisdiction is plain and I know of no constitutional objections. It has been said, however, that Congress does not possess the power under the Constitution to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such tribunals. This very question was raised in the case of the United States vs. Ritchie, decided by the Supreme Court of the United States and reported in vol. 58, United States Supreme Court Reports, page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California, under an act of Congress of March 3, 1851. Provisions were made by the act, at the suit of the losing party, for an appeal to the United States district court for the northern district of California. The board decided the case in favor of the claimant and against the Government. The United States appealed

in accordance with the provision of the statute to the aforesaid district court, where it was again tried de novo and an appeal regularly taken to the United States Supreme Court. In that court the question of the jurisdiction of the district court to try the case was raised. The contention is stated in the opinion."

Upon an examination of the act of Congress referred to by Judge Clayton, under the provisions of which the decision of the Supreme Court was based, it will be found that the act itself provided that upon an appeal from the Commission to settle the private land claims in California to the United States court, in section 10 thereof, that the United States district court for California should proceed and render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken upon the order of said court in such appeal. So it will be seen in this case, as well as in the cases upon appeal from the
43 United States Commissioners in the Indian Territory, that the acts themselves provided for a trial de novo. It will further be seen, by referring to the act of June 10, 1896, supra, under which the United States courts were proceeding, contained no such provision or direction; it simply provided that if the tribe or any member be aggrieved by the decision of the tribal authorities, or the Commission provided for in this case, it or he might appeal from such decision to the United States district court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. But it is claimed that the Supreme Court of the United States, speaking through Chief Justice Fuller, in the case of Stephens vs. Cherokee Nation, 174 U. S., page 445, has decided unmistakably that such trial was to be had de novo. If this contention was sound, of course this court would be bound thereby. But let us look at the language used by the learned Chief Justice in delivering the opinion in the Stephens case. His language is as follows:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it exercising only quasi judicial powers, by the transfer of their proceedings and decisions, denominated 'appeals' for want of a better term, to judicial tribunals for examination and determination de novo."

Now, we may ask, what was the first objection to which the Chief Justice referred in stating his views above quoted? It was stated by him thus:

"The question arises whether the judgments made final by the statutes are the judgments of that court in the several districts delineated by the act of March 18, 1895, or of the appellate court herein pro-
44 vided for, which may be referred to later on, since it is objected to in the outset that no appeal from the decisions of the Dawes Commission, or of the tribal authorities, could be granted to the United States court; and furthermore, that at all events it will not be competent for Congress to provide for an appeal from the decrees of the United States courts in the Indian Territory, after such decrees have been rendered and the term of the court expired."

Now, it will be seen here, the learned Chief Justice does not determine that the right and power of appeal, which is treated of above, does, as a matter of fact, conclusively carry with it, in the very terms of the act

conferring the right and power, the right to prosecute an appeal de novo; or that it orders or declares by any act or any language that can bear such a construction that the procedure on appeal is to be as a trial de novo, or that it specifies what the procedure in the appellate court shall be. In addition, the Chief Justice, in his decision in the Stephens case, distinctly declares that the United States Supreme Court had only power, in determining that case, to hear such appeal as he was passing upon, under the statute of 1896, in so far, merely and entirely, as the constitutionality of the act or acts was concerned; but the question of the right of appeal de novo, as was claimed existed to the district courts of the Indian Territory, under the act of June 10, 1896, did not and does not involve any constitutional questions. The learned Chief Justice says that Congress may pass an act constitutionally, commanding a trial de novo in the court above, and goes no further.

It will be observed that the Chief Justice did not say that the act of 1896 meant that the appeal should be de novo, but says that Congress had the right to pass such an act.

The case of Kimberlin vs. Commission to the Five Civilized
45 Tribes, decided in the circuit court of appeals for the 8th circuit, and which is found in the C. C. A., vol. 44, page 109, where some two years after the expiration of the time fixed by the act of June 10, 1896, within which the Commission is authorized to receive applications for citizenship, Mary Jane Kimberlin filed her application and asked that it be passed upon. The Commission held that it had no power to receive or pass upon applications after September 10, 1896. The applicant applied to the United States court for the southern district of the Indian Territory for a writ of mandamus to compel the Commission to entertain her application and admit her. The court denied the petition, and an appeal was taken to the court of appeals for the Indian Territory. Its decision was an affirmance of the decision of the district court, and an appeal was taken to the United States circuit court of appeals for the 8th circuit. Judge Sanborn, in delivering the opinion, among other things says, in speaking of the right of appeal, as given in the act of June 10, 1896:

"It provides for the speedy determination of the questions presented by the various applications, and gives to each applicant the right to a review of the action of the Commission by an appeal to the Federal court."

That is, a looking over of any appeal to the United States district courts of the Indian Territory, in order to determine if any error was committed by said Commission as to law or fact which requires correction. Judge Sanborn further says in this opinion:

"It is conceded that the commissioners are executive officers; it is not their sole duty or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who may apply to them for membership in the Five Nations, they are vested with judicial power by the act
46 of Congress; they have authority * * * to use every fair and reasonable means within their reach for the purpose of determining such citizenship, and above all they are empowered to determine the application of all persons who may apply to them for citizenship. This grant of power is plenary; it vests the authority and

imposes the duty on the Commission to hear and decide every question of law and fact which is material to the rights of the applicant to enrollment as a citizen of the nation."

It may further be said, as bearing on the plenary powers of the above-mentioned Commission, that the act of June 10, 1896, further provides, following the portion above construed in the circuit court of appeals, defining the powers of said Commission to hear and determine the questions of citizenship, or to protect any of said nations from fraud or wrong. That is, everything in the power of said Commission was mandatorily directed by Congress to be done, and every reasonable step it could take, in order, as far as lay in its reach, to protect any of said nations from not only fraud, but from any wrong.

It thus appears that in this decision of the court of appeals it is stated upon fair construction that the Commission had judicial powers of a plenary nature. As to procedure, where does the language giving the right of appeal from the decisions even intimate that a review of the same of the question of law or fact are to be heard de novo, either as a matter of procedure or of right, or recommended, even remotely, as we can see? So, then, here we have a commission having plenary rights and powers given by positive law and clear language, to hear and determine all questions of law and fact which might come before it under the terms of the law conferring such jurisdiction, and the right of appeal, as expressed in the act of June 10, 1896, from its decisions, avoiding everything going to declare that the appeal should be heard de
47 novo, as did the statute involved in the Ritchie case and also the statute governing the appeals from commissioners of the United States court, cited by the defendants, giving a right of appeal to a trial de novo, or any language specifying the procedure to be had on such appeal in the court above. It follows, then, that we must determine how such an appeal should have been tried in the United States district courts of the Indian Territory, by interpreting fairly the language of the act of June 10, 1896, giving such appeal to the reviewing court of the last resort. From the language of the act conferring plenary powers as a judicial body upon the Dawes Commission, supra, and also giving a right of appeal from its decisions, as the clause of the act giving the appeal does not distinguish it in any way perceptible to us from the ordinary court having plenary powers to try all cases as to law and fact, of which the act of Congress gives it jurisdiction, it appears clearly that an appeal is to be granted in an ordinary way and manner, as if the appeal had been taken from an ordinary State circuit court to a court of appeals, or from any similar court having plenary powers to try questions of law or fact, to an appropriate appellate court, for review of the action of the court below, having such plenary powers over matters to be heard under its jurisdiction originally.

The members of the Dawes Commission were appointed by the President and confirmed by the United States Senate, and have larger powers than those conferred on the commissioners of the United States courts anywhere, and therefore no parallel can be drawn with the powers of the United States district courts of the Indian Territory, on appeal from such tribunals, the mere creation by appointment of the district judge, with that possessed by the district court on appeal from the Dawes Commission. The United States district court commissioner is the creation

of a direct legislative act of Congress, but having very limited
48 powers compared with those conferred upon the Dawes Commission by the act of Congress giving it such vast powers, and especially under the act we are now considering, to try these citizenship cases; and dignifying the members thereof, not only with a grant of great power, but paying them salaries as great as the judges of the district courts, and their appointment by the President requiring the Senate's concurrence.

In considering the questions raised by the pleadings, we have considered all that part of the constitutions of the Choctaw and Chickasaw notions, or tribes of Indians, and all their laws passed by their legislature and general council from time to time; and also all treaties made and entered into by said tribes with the United States, as well as those treaties entered into between the two tribes; and also the rules of the Commission to the Five Civilized Tribes, in existence in 1896, bearing upon the points at issue, which will be seen by reference to the opinion in this case.

So that in all the various aspects in which this question is to be viewed, considering the case of Kimberlin against the Commission to the Five Civilized Tribes, supra, and all the statutes and decisions we have been able to examine; and in further considering what dignity and power is conferred on the Dawes Commission, as to judicial and other powers, and the method of their appointment and confirmation, we are led to the irresistible conclusion that the appeals from the Dawes Commission, under the act of June 10, 1896, to the United States court in the Indian Territory, should have been confined to a review of the action of the Commission upon the papers and evidence submitted to such Commission and should not have extended to a trial de novo of the question of citizenship. We think every fair construction and intendment of the language of the act, giving the right of appeal to the United States courts for the Indian Territory, leads to this conclusion; and that grave
49 and serious prejudicial error must necessarily be presumed, because the United States courts for the Indian Territory in trying such appeals proceeded without any warrant of law, and therefore the judgments they rendered in the cases at bar, as in all cases where the parties are similarly situated, can not be upheld and should be annulled and declared void.

And as a further confirmation that such ought to be the judgment of this court in this proceeding, the fact that if notice to both tribes was indispensable and in the sense meant in the act of July 1, 1902, it will be remembered that this word "indispensable" has reference as well to the ordinary practice in such cases where a joint and common interest in property is held, as here by both tribes of Indians involved in this case, and also it has reference to what should have been done by the Dawes Commission in carrying out the declaration of Congress properly as to the method of acquiring jurisdiction, and the procedure to be pursued by the Dawes Commission, as set out in the act of June 10, 1896; and this view is further confirmed when it appears that Congress in the 31st section of the act of July 1, 1902, has termed the failure to give both tribes notice, and the hearing de novo by the United States district courts of the Indian Territory, not prescribed by the act giving right of appeal

from the Dawes Commission to the district courts for the Indian Territory, as irregularities claimed and insisted upon by such nations, thus clearly indicating that the Congressional view was and is, that the Dawes Commission having failed to give proper notice of a reasonable kind to both tribes, holding common interests in the lands of a proceeding affecting their joint property rights, and the United States district courts having tried the cases on appeal de novo, the act of June 10, 1896, not ordering it, that such matters not only be matters considered irregular in order that a decree may be made through this court, speaking to
50 the subject, that such irregularities having occurred, the judgments involved here should be annulled and vacated.

In the determination of the questions raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with section 31 of the act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determination of the two propositions as decisive of all. So, in consideration of all the various aspects of this case, and being of the opinion that, owing to the manner in which the lands are held by the two tribes, that notice to both tribes was indispensable; and being further of the opinion that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to trial de novo of the question of citizenship, we are of the opinion, on account of the errors pointed out, that the judgments rendered by the United States courts for the Indian Territory, under the act of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill, as well as to those who have come in and made themselves parties defendants, and all persons so situated should be annulled and vacated, and it is therefore so ordered.

We concur fully and entirely in what is written, said, and declared by Chief Judge Adams in the opinion herein rendered and filed, both as to the reasoning, the conclusions arrived at, and the matters passed on and adjudged.

WALTER L. WEAVER,
Associate Judge.

HENRY S. FOOTE,
Associate Judge.

(Indorsed:) Supreme Court U. S. October term, 1903. Term No., 12, original. Ex parte in the matter of U. S. Joins, petitioner. Return to rule to show cause. Filed August 24th, 1903.

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